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Supreme Court, U.S.
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No. 93-____

In The
Supreme Court of the United States
October Term, 1993

DAVID JACK VOGT, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition For Writ of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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April 1, 1994

85 pp

QUESTIONS PRESENTED

I.

Whether the Federal Court of Appeals has rendered an opinion that has sanctioned a departure by a lower Court, so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision where the Court below has sanctioned a Federal Judge's failure to recuse himself, *sua sponte*, under 28 U.S.C. §455(a)&(b)(1)&(2), where specific Section 455(b) disqualifying circumstances existed at the time of trial, thereby denying Petitioner a fair and impartial trial, before a fair and impartial judge, as guaranteed by the Fifth Amendment to the United States Constitution?

II.

Whether Section 455(e), Title 28, United States Code, creates a personal jurisdictional limitation on the authority of a Federal Judge to participate in a given case where that Judge's participation was in violation of 28 U.S.C. §455(b)(1)&(2), and if so, whether Judgments and Orders rendered in violation of that statute are void when discovered where the Judge failed to disclose such conflict of interest, *sua sponte*, prior to, during, or after trial?

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DAVID JACK VOGT, JR.,

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Petition For Writ of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit

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Petitioner, David Jack Vogt, Jr., *pro se*, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit refusing to grant post-conviction relief where Petitioner was denied a fair and impartial trial, before a fair and impartial judge, as guaranteed by the Fifth Amendment to the United States Constitution, where the District Court Judge failed to recuse himself for cause, *sua sponte*, in violation of 28 U.S.C. §455(a)&(b)(1)&(2) and principles of due process.

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OPINIONS BELOW

The unpublished per curiam opinion of the Fourth Circuit Court of Appeals is reported as *United States v. Vogt*, No. 92-6549 & 92-6550, and appears in Appendix A to this Petition. The unpublished opinion of the District Court for the Middle District of North Carolina appears in Appendix B to this Petition. The unpublished Report and Recommendation of the Magistrate Judge, adopted by the District Court for the Middle District of North Carolina, appears in Appendix C to this Petition.

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JURISDICTION

The opinion of the United States Court of Appeals for the Fourth Circuit was filed on February 23, 1994. The jurisdiction of this Court is invoked under Title 28, United States Code §1254(1).

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment V & VI to the United States Constitution, 28 U.S.C. §455, and Rule 60(b), Federal Rules of Civil Procedure are set forth in Appendix E.

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STATEMENT OF THE CASE

A. Course of proceedings and basis for Federal Jurisdiction

The United States District Court for the Middle District of North Carolina had jurisdiction to hear this case pursuant to Title 28 U.S.C. §3231. Petitioner respectfully submits that the District Court Judge did not have personal jurisdiction to hear this case under the provisions of 28 U.S.C. §455(e) and 28 U.S.C. §455(b)(1)&(2).

On October 30, 1986, an indictment was returned charging Petitioner, David Jack Vogt, Jr., attorney Burton R. Levey and attorney William C. Ray with a single count of conspiracy to impede the function of the Internal Revenue Service in violation of 18 U.S.C. §371 (a "*Klein*" conspiracy). See *United States v. Klein*, 247 F.2d 908 (2nd Cir. 1957).

On January 5, 1987, a multi-count superseding indictment was filed charging Petitioner with a substantive RICO violation under 18 U.S.C. §1962(a); conspiracy to violate RICO under 18 U.S.C. §1962(d); and a repeat of the 18 U.S.C. §371 "*Klein*" conspiracy.

On June 18, 1987, after a 2 ½ month jury trial before United States District Court Judge Frank W. Bullock, Jr., the jury found Petitioner guilty on Counts I (substantive §1962(a) RICO) and III ("*Klein*" conspiracy). The jury found Petitioner not guilty of Count II (RICO conspiracy), and both of Petitioner's co-defendants, Ray and Levey, not guilty of all charges.

On December 30, 1987, Petitioner was sentenced by Judge Bullock on Count III to imprisonment for five years to run consecutive to the 20-year term of imprisonment he imposed on Count I (substantive RICO count), both maximum sentences. A maximum $35,000 fine was imposed for both counts, and a forfeiture of $553,308.23 was ordered in a bifurcated decision by the Judge (See *United States v. Vogt*, 713 F.Supp. 847 (M.D.N.C.1987).

Petitioner raised a number of arguments, not involved in this petition, to the Fourth Circuit Court of Appeals, which were ultimately decided adversely to Petitioner on July 26, 1990 (See *United States v. Vogt*, 910 F.2d 1184 (4th Cir. 1990). Rehearing was denied on August 16, 1990, and a subsequent Petition for Writ of Certiorari to the Supreme Court was denied on February 19, 1991 (See *Vogt v. United States*, 498 U.S. 1083 (1991). This post-conviction case then arose.

On May 9, 1991, Petitioner filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. §2255 to vacate, set aside, or correct sentence, with an accompanying Motion for Disqualification of certain District Court Judges to consider this matter under the provisions of 28 U.S.C. §144 and §455(a)&(b), due to an extrajudicial bias or conflict of interest each judge had in this particular case.

On January 15, 1992, Petitioner filed a Petition for Writ of Mandamus with the Fourth Circuit Court of Appeals to compel District Court Judges Frank W. Bullock, Jr. and Richard C. Erwin to recuse themselves from considering this Habeas Corpus Petition.

On February 19, 1992, the Magistrate Judge issued an Order and Recommendation that District Court Judge Bullock recuse himself from determining Petitioner's post-conviction motions to avoid the appearance of a conflict of interest, and that Petitioner's §2255 Petition be denied and dismissed by Judge Erwin. (See Appendix C.)

On March 3, 1992, Petitioner filed timely Objections to the Magistrate's Order and Recommendation.

On April 9, 1992, District Court Judge Frank W. Bullock, Jr. filed an Order recusing himself "under 28 U.S.C. §455(a) to avoid even the appearance of impropriety in any further proceedings involving the Petitioner." (See Appendix D.)

On May 1, 1992, District Court Judge Erwin adopted the Magistrate judge's order and recommendation and denied and dismissed Petitioner's Habeas Corpus Petition, (See Appendix B). Petitioner filed a timely Notice of Appeal to the Fourth Circuit Court of Appeals on May 11, 1992.

Petitioner filed a multi-issue appeal, including the issue raised herein, to the Fourth Circuit Court of Appeals on August 10, 1992, and on February 23, 1994, the Appellate Court affirmed the lower Courts' decision in this case in an unpublished per curiam opinion. (See Appendix A.) This Petition follows.

B. Facts

Petitioner argued before the Court of Appeals for the Fourth Circuit that he was denied a fair and impartial trial before a fair and impartial Judge, as guaranteed by the Fifth

Amendment to the U.S. Constitution (see Appendix E), because the trial Judge failed to recuse himself, *sua sponte*, in violation of 28 U.S.C. §455(a)&(b)(1)&(2) (see Appendix E), where the Judge was undisputedly a member of the same law firm as prosecution witness, and former law partner, Robert Douglas, during the same time period that law firm represented a significant number of individuals and corporations central to the RICO and tax conspiracy indictment before the trial Court. Petitioner additionally argued that the circumstances of this case constituted a "manifest necessity" for recusal when the Judge became aware of, or should have become aware of, his former law firms' and law partners' deep involvement in many of the overt acts actually charged in Petitioner's indictment. The record clearly shows that no full disclosure was ever made by Judge Bullock in this case, as is required under the provisions of 28 U.S.C. §455(e). Indeed, the record below shows no disclosure at all.

Although there is no affirmative evidence in the record showing that Petitioner's trial counsel was ever aware of the District Court Judge's conflict of interest in this case at the time of trial, Petitioner argued that, *arguendo*, if Petitioner's counsel was aware of said conflict, and did not raise that issue at the time of trial, then Petitioner's counsels' failure to raise that issue on the record manifestly amounts to ineffective assistance of counsel under the Sixth Amendment to the Constitution of the United States (see Appendix E). Finally, Petitioner argued that, under the circumstances of this case, 28 U.S.C. §455(e) created a personal jurisdictional limitation on the authority of Judge Bullock to participate in this particular case, and that because of this fundamental defect, all of Judge Bullock's judgments and Orders are void. Therefore, Petitioner's conviction should be vacated and all fines and forfeitures resulting from such void judgments should be

returned under Federal Rules of Civil Procedure, Rule 60(b) (see Appendix E.)

The Fourth Circuit adopted the position of the District Court below which erroneously determined that Petitioner's claim did not state a "fundamental defect which inherently results in a miscarriage of justice" and that Petitioner's claim did not "meet the Constitutional test for the disqualification of a Judge", finding that the Judge did not have a "direct, personal, substantial, [and] pecuniary interest in the matter being litigated." Because the Fourth Circuit's decision did not address any of the substantive questions mentioned above, or the merits of Petitioner's appeal to that Court, the question regarding jurisdictional sufficiency and manifest necessity remain unresolved or in conflict with prior determinations in the Fourth Circuit, among the various Federal Circuits, and in this Court.

REASONS FOR GRANTING THE WRIT

I. The United States Court of Appeals for the Fourth Circuit has rendered an opinion that has sanctioned a factually and legally incorrect determination by a District Court below, in conflict with statutory law, principles of due process, decisions of this court, other Courts of Appeals, and prior decisions of the Fourth Circuit itself.

In the instant case, it is undisputed that the Trial Judge, the Honorable Frank W. Bullock, Jr., was a member of the same law firm as attorney Robert Douglas, during the same period of time that law firm represented the following individuals and corporate entities central to Petitioner's trial:

(A) Harvey G. Mitchell, Jr. - a material government witness central to this proceeding.

(B) David Jack Vogt, Jr. - the Petitioner in this case, and a defendant at the time of trial.

(C) David Jack Vogt, Sr. - the Petitioner's father.

(D) Darryl Myers - Grand Cayman attorney for two alleged racketeering enterprise corporations central to this proceeding.[1]

(E) Chardon Company, N.V. - an alleged racketeering enterprise corporation central to the indictment against petitioner.

(F) Real Tech International, Ltd. - an alleged racketeering enterprise corporation central to the indictment against Petitioner.

(G) Colonial Manor Apartments - alleged to have been purchased with racketeering funds, from Harvey G. Mitchell, Jr., by Petitioner (both of whom were clients

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[1]At one point in the trial, the government asked Judge Bullock to declare his former law firm client, Darryl Myers, to be an unindicted co-conspirator. Judge Bullock declined to do that because he felt that such a ruling was questionable, and might result in further cross-examination of his former law partner, Robert Douglas. However, Judge Bullock later found Darryl Myers to be a co-conspirator for purposes of forfeiture proceedings. *See United States v. Vogt, Supra,* 713 F.Supp. at 851.

of Judge Bullock's former law firm).[2]

In addition, it is clearly established that Judge Bullock's former law partner, Robert Douglas, was also a material Government witness central to this proceeding.[3]

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[2]This transaction was handled by Judge Bullock's then law partner, Robert Douglas. $100,000 in cash was alleged to have been passed "under the table" in Judge Bullock's former law firm relative to this real estate closing. Judge Bullock's later ruling on the credibility of Mitchell's testimony as to that issue, in the forfeiture phase of this proceeding, was in direct contradiction with his former law partner's, and others, testimony as to that alleged event. There were no other witnesses to that alleged transaction. *See United States v. Vogt, Supra.* 713 F. Supp. at 852.

[3]The Magistrate Judge's Order and Recommendation, upon which the decision of the Fourth Circuit Court of Appeals opinion of February 23, 1994 was based, attempts to minimize the importance of attorney Robert Douglas's testimony in this case. However, an analysis of the record clearly shows that Douglas's testimony was extremely important to the Government's case where the theory of prosecution was that the "use or investment" or even "divestment" of racketeering funds continued the statute of limitations eight years past the last racketeering act alleged in the indictment and that testimony given by Douglas was directly related to, and a critical part of, transactions listed as overt acts in the indictment that extended that statute of limitations period to save an otherwise untimely indictment. *See* Petition for Writ of Certiorari, *Vogt v. United States, 498 U.S. 1083* (1991). Indeed, the Douglas/Bullock law firm was, in one way or another, involved in the representation of individuals and corporate entities in transactions which actually appeared as overt acts in the instant indictment (i.e. the RICO enterprise; the RICO violation itself; Overt Acts 5, 7, 8, 15, 39 and 40 of Count II; Overt Acts 6, 8, 9, 16 and 38 of Count III of the indictment). It should also be noted that attorneys Ray and Levey were indicted as co-conspirators in this case for performing many of the same acts Judge Bullock's former law partner performed for the *same* individuals and corporations, e.g. real estate closings. Although not actually named in the indictment, some of the overt acts alleged conduct

Clearly, Judge Bullock had a statutory duty to recuse himself from presiding over Petitioner's trial. The language of 28 U.S.C. §455(b)(2) is unequivocal on this point.

> Title 28 U.S.C. [Sec.] 455(b)(2) provides that a judge *shall* disqualify himself in the following circumstances:
>
> > Where in private practice he served as lawyer in the *matter in controversy, or a lawyer with whom he previously practiced law served during such association as lawyer concerning the matter,* or the judge, *or such lawyer has been a material witness concerning it* . . . The legislative history indicates that disqualification under this statutory provision is *mandatory*. H.Rep.No. 93-1453, 93d Cong. 2d Sess., 3 U.S. Code Cong. & Admin. News, pp. 6351, 6355 (1974).

In re Rodgers, 537 F.2d 1196, 1198 (4th Cir. 1976)(emphasis by the Court and added).

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which involved both Judge Bullock's former law partner and attorneys Ray and Levey, and in other instances, some of the overt acts alleged conduct which involved the Judge's former law partner, without any participation from attorneys Ray or Levey. Petitioner is *not* suggesting that either attorney Robert Douglas or Judge Frank W. Bullock, Jr. committed any illegal acts relative to those allegations found in the indictment. Petitioner is only stating the factual situation in this particular case.

> 28 U.S.C. §455(a) requires any federal judge to "disqualify himself in any proceeding in which his impartiality *might reasonably be questioned." 28 U.S.C. §455(b) lists a set of circumstances in which a federal judge has an absolute duty to disqualify himself.*

United States v. Sartori, 730 F.2d 973, 976 & n.2 (4th Cir. 1984)

The Seventh Circuit has held that both subsections (a) and (b) of Section §455 are self-executing. That there is no time limit for raising the recusal issue under either subsection, and that the failure of a judge to recuse himself under either subsection *sua sponte*, where there are grounds for him to do so, is reviewable, *de novo*, on appeal. *Taylor v. O'Grady*, 888 F.2d 1189, 1200 (7th Cir. 1989); *SCA Services, Inc. v. Morgan*, 557 F.2d 110 (7th Cir. 1977).

In deciding *SCA Services*, the Seventh Circuit noted, significantly:

> The provisions [of 28 U.S.C. §455] *are mandatory; they are addressed to the judge* and require that he disqualify himself in certain circumstances. They were adopted because the drafters of the statute believed "that confidence in the impartiality of federal judges is enhanced by a more strict treatment of waiver." *They impose no duty on the parties to seek disqualification nor do they contain any time limits within which disqualification must be sought.*. Moreover, although the Department of Justice recommended that the new Section 455

> should include some limitation of time "to prevent applications for disqualification from being filed near the end of the trial when the underlying facts were known before," (H.R. Rep. No. 1453, 93d Cong. 2d Sess. 9 (1974) U.S. Code Cong. & Admin. News, 1974, p. 6358, Congress did not incorporate this recommendation in the statute. Because it is obvious that any decision to deny disqualification based on grounds of waiver and estoppel would frustrate the purpose of the statute, these defenses to the petition are without merit.

557 F.2d at 117 (citations omitted)(emphasis added). *Accord W. Clay Jackson, etc. v. Greyhound Leasing*, 467 F.Supp. 801 (D.P.R.1979); *See also United v. Schreiber*, 599 F.2d 534, 539 (3rd Cir. 1979)(Seitz, C.J. concurring).

In *Liljeberg v. Health Services Acquisition, Corp.*, 486 U.S. 847 (1088) this Court found that violation of a statute which requires the judge to disqualify himself in any proceeding in which *his impartiality might reasonably be questioned,* may warrant relief from final judgment *provided a motion is made within a reasonable time.* However, *Liljeberg* was a case that involved a waivable disqualification factor under Section 455(a), and *not* a disqualifying factor under §455(b) *from which no waiver can be accepted. See Liteky v. United States,* ___U.S.___, (No. 92-6921, 3/7/94) (Justice Kennedy, concurring). Petitioner respectfully submits that it would be poor statutory construction to read a timeliness requirement into a non-waivable Subsection (b) violation, especially under the circumstances of this case.

In the instant case, the government did not raise the issue of timeliness at the District Court level, and was therefore precluded from doing so on appeal. However, even if such an argument could have been made by the government, *arguendo*, timeliness would still not be a factor in this case where the District Court Judge never disclosed his conflict of interest on the record, as is required under Section 455(e). Petitioner submits that he has raised this issue as soon as he possibly could after discovery of this conflict of interest. *See Delvecchio v. Illinois Dept. of Corrections,* 8 F.3d 509, 517 (7th Cir. 1993). Although there is no affirmative evidence in the record showing that Petitioner's trial counsel was ever aware of the District Court Judges conflict of interest in this case at the time of trial, Petitioner submits that, *arguendo, if* Petitioner's counsel was aware of said conflict, and did not raise that issue at the time of trial, then Petitioner's counsel's failure to raise that issue on the record manifestly amounts to ineffective assistance of counsel under the Sixth Amendment to the U.S. Constitution.

28 U.S.C. §455(b)(2) clearly and unequivocally states a very specific ground for recusal in this case that makes no allowance for the weight of the former law firm partner's testimony or for the Judge's actual knowledge of the facts of this case. Scienter is not an element of a violation of §455(a) [or §455(b)]. *Liljeberg v. Health Services Acquisition Corp, Supra.,* 846 U.S. at 859 (1988). Under Section 455(c) Judges remain under a duty to stay informed of any personal or fiduciary financial interest they may have in cases over which they preside. Furthermore:

> "Knowledge and actions of any partner in a law firm are imputed to every other partner [for purposes of motion to disqualify lawyer

> for conflict of interest] . . . it is considered to be contrary to Public Policy to inquire as to whether communications regarding client confidences and secrets in fact took place."

Hampton v. Hanrahan, 499 F.Supp. 640, 645 (N.D.III. 1980)(citations omitted). *See also Westinghouse Corp. v. Kerr-McGee Corp.*, 580 F.2d 1311, 1318 (7th Cir. 1798), *cert. den.* 439 U.S. 955 (1979); *Scholetter v. Railoc of Indiana, Inc.*, 546 F.2d 706, 710 (7th Cir. 1976).

In the instant case, there can be no doubt that Judge Bullock was fully aware of the fact that his former law partner was going to be a witness in this case, no later than the first day of trial when he read the Government's witness list. There can also be absolutely no question that Judge Bullock was fully aware of this former law firms', and law partners', extensive involvement in this case by the time former law firm client Mitchell testified, and again when former law partner Douglas testified. Yet Judge Bullock made no effort to disqualify himself from further involvement in this trial, or to inform parties of that conflict of interest, as is required under 28 U.S.C. §455(e). Indeed, the record below shows no disclosure at all. In this regard, the Eleventh Circuit Court of Appeals has held that the duty to recuse applies equally before, during and after a judicial proceeding, whenever disqualifying circumstances become known to the Judge. *United States v. Kelly*, 888 F.2d 732, 744 (11th Cir. 1989).

This Court has implicitly held that the very purpose of Section 455(a) is to promote confidence in the judiciary by avoiding even the appearance of impropriety, *Liljeberg v. Health Services Acquisition Corp., Supra*, 486 U.S. at 865, and that the Due Process Clause "may sometimes bar trial by

judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties." *In re Murchison*, 349 U.S. 133, 136 (1955). *See also Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813 (1980).

Based on the circumstances of this case, Judge Bullock clearly had a direct, personal, substantial and pecuniary interest in the matter being litigated, if for no other reason that an understandable and natural interest in the good reputation of his former law firm and partner. *See Potashnick v. Port City Const. Co.*, 609 F.2d 1101, 1114 (5th Cir.1980), *cert. den.* 449 U.S. 820 (1980); *Aetna Life Insurance Co. v. Lavoie, Supra*, 475 U.S. at 824-26.

Judge Bullock's rulings on the admissibility of attorney/client material, some of which was actually generated by his former law firm while Judge Bullock was still a member of that firm, is a fundamental conflict of interest by any standard.[4] A "reasonable man" could not conclude that such decisions by Judge Bullock could be, or would be, "fair and impartial" within the meaning of the Fifth Amendment to the U.S. Constitution or 28 U.S.C. §455(a)&(b)(1). *United States v. Carmichael*, 726 F.2d 158, 160 (4th Cir.1984). An essential element of a fair hearing for Constitutional purposes is an

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[4]Significantly, Judge Bullock's recusal order of April 9, 1992 concedes that he did, in fact, make a ruling on a document involving attorney/client material from his former law firm (see Appendix D). Petitioner respectfully submits that Judge Bullock's acceptance of 42 attorney/client documents involving his former law firm into evidence, and upon which attorney/client privilege was previously claimed, was a *de facto* ruling on the admissibility of each of those documents. *See In re Letters of Rogatory from Supreme Court of Ontario*, 661 F.Supp. 1168, 1173-74 (E.D. Mich.1987).

impartial decision maker. *Goldberg v. Kelly*, 397 U.S. 254, 271 (1970).

As the Ninth Circuit Court of Appeals has stated:

> The relationship between Section 455(b) and Section 455(a) is not complicated. As we said in *Herrington v. Sonoma County*, [834 F.2d 1488, 1502 (9th Cir. 1987)].
>
> > Section 455(a) covers circumstances that *appear* to create a conflict of interest, whether or not there is actual bias. *Davis v. Xerox*, 811 F.2d 1293, 1295 (9th Cir.1987). *Section 455(b) covers situations in which an actual conflict of interest exists*, even if there is no appearance of one . . . For our purposes, it is sufficient to state that *Section 455(b) provides us with a concrete example where the appearance of partiality suffices to establish a ground for recusal under Section 455(a) even absent actual bias.*

Preston v. United States, 923 F.2d 731, 734 (9th Cir. 1991)*(Emphasis added). See also United States v. Werner*, 916 F.2d 175, 177 (4th Cir.1990) and *United States v. Chantal*, 902 F.2d 1018, 1023-24 (1st Cir. 1990).

The dictates of 28 U.S.C. §455(a) or (b) constituted a "manifest necessity" for recusal at the point in time when Judge Bullock became aware of, or should have become aware of, his former law firm's and law partner's deep involvement

in this case. *Kelly, Supra; Sartori, Supra.* Judge Bullock's failure to do so after embarking on a trial he should not have presided over, denied Petitioner any semblance of a fair and impartial trial in this case.

Judge Bullock's failure to recuse himself from these proceedings, *sua sponte*, under 28 U.S.C. §455(a) or (b), was clearly a violation of the Due Process Clause of the United States Constitution. As this Court has previously held, "a fair trial in a fair tribunal is a basic requirement of due process." *Nebraska Press Association v. Stuart*, 427 U.S. 539, 551 (1976); *Withrow v. Larkin*, 421 U.S. 35, 46-47 (1975); *See also Painter v. Leeke*, 485 F.2d 427, 429 (4th Cir.1973). "Fairness of course requires an absence of actual bias. . . [and] to prevent even the probability of unfairness . . . no man can be a judge in his own case and no man is permitted to try cases *where he has an interest in the outcome*. That interest cannot be defined with precision. *Circumstances and relationships must be considered." In re Murchison, Supra*, 349 U.S. at 136 (*emphasis added*). Rights to an impartial judge and right to counsel, among other rights, are so basic to a fair trial that their infraction can never be treated as harmless error. *Berger v. United States 255* U.S. 22, 33 (1921), *See also Chapman v. California*, 386 U.S. 18, 23 (1967). *And see* ABA Canons of Judicial Ethics 3C(1)(b).

A violation of the Fifth Amendment's Due Process Clause, as discussed herein, was clearly such a fundamental defect in Petitioner's trial so that he should have been *per se* entitled to the relief sought in his §2255 Habeas Corpus Petition. *Knapp v. Kinsey*, 232 F.2d 458, 465-67 (6th Cir. 1956), *cert. den.* 352 U.S. 892 (1956). *See also Anderson v. Sheppard*, 856 F.2d 741, 745 (6th Cir. 1988).

Although Judge Bullock did not explicitly state that he had a conflict of interest in Petitioner's case, his Recusal Order of April 9, 1992, under the provision of 28 U.S.C. §455(a) (see Appendix D), implicitly concedes the same conflict of interest situation that existed at the time of Petitioner's trial.

Petitioner respectfully submits that the Magistrate's Order and Recommendation, upon which the Fourth Circuit Court of Appeals has apparently based its opinion in this case, did not correctly state the extensively documented factual situation of this case and did not follow clearly established statutory and/or case law or principles of due process, which would have required the Court to vacate Petitioner's conviction and grant relief under Rule 60(b), Federal Rules of Civil Procedure.

Petitioner respectfully submits this Honorable Court should exercise its power of supervision and grant its Writ of Certiorari in this case in the interest of Justice and to promote Public confidence in the integrity of the Judicial Process.

II. Section 455(e), Title 28, United States Code, creates a personal jurisdictional limitation on the authority of a Federal Judge to participate in a given case where that Judge's participation is in violation of 28 U.S.C. §455(b)(1)&(2), thereby rendering void all judgments and orders rendered without such personal jurisdiction.

The case which best explicates Petitioner's position under this argument, and should control on the recusal issue under 28 U.S.C. §455(b)(1)&(2), is *United States v. Gibson*, 835 F.2d 1323 (10th Cir.1988), *cert. den.* 486 U.S. 1044 (1989). The Court in *Gipson* noted ". . . we believe *[Section] 455(e)*

creates what is tantamount to a 'jurisdictional' limitation on the authority of the judge to participate in a given case." 835 F.2d at 1325 (*emphasis added*).

The fact setting in *Gipson* is striking. There, the defendant pled guilty after recusal was denied. The tenth Circuit held that the defendant did not waive a violation of §455(b).[5] The Court reasoned that because of the language of Subsection (e), a litigant cannot waive Subsection (b) grounds for recusal, just as a litigant may not waive absence of jurisdiction.

An examination of Petitioners' §2255 Motion shows that one of the major grounds for which he is seeking post-conviction relief is that the District Court was disqualified from presiding over his trial under 28 U.S.C. §455(b)(2). Petitioner alleged circumstances very similar to the case of *In re Rodgers, Supra.* In that case, the Fourth Circuit held that because the trial judge's former law partner had a role in events leading up to the case at issue, and where a client of the firm, at the time the judge was still in the firm, was a material witness, 28 U.S.C. §455(b)(2) *required* the judge to recuse himself.

The fact that Section (b) is non-waivable suggest that Congress believed that the gain in protecting against actual bias, prejudice, or conflict of interest outweighs the loss to judicial economy in prohibiting waivers. While it is clear that

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[5]In the instant case, the record clearly shows that no full disclosure was ever made by the judge, as is required under Section 455(e), therefore no objection was made by petitioner's counsel, and no waiver was sought by the judge.

Section 455 does not affect the jurisdiction of all judges to hear a case under the "Rule of Necessity", it does provide for the *disqualification of individual judges* under certain circumstances. *United States v. Will*, 449 U.S. 200, 211 (1980). That disqualification can only be characterized as a loss of *personal jurisdiction* to preside over a certain case where a *non-waivable disqualifying situation exists*, as in the instant case.

Under Article III, Section 2 of the United States Constitution, Congress has the sole power to fix the jurisdiction of the Federal Courts, and it does so by Federal Statute. Where Congress has enacted a statutory law specifically directed to Federal Judges, which forbids a Federal Judge from participating in a given case because of particularized disqualifying circumstances, a Federal Judge who acts in contravention of that statutory law does so without personal jurisdiction.

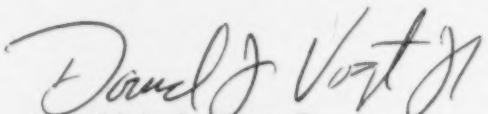
The Circuit Court of Appeals below has failed to address this important issue, and this principle is not clearly established among the various Federal Circuits or in this Court. For these reasons, this Court should Grant its Writ of Certiorari in this case to clarify this important question and to promote Public confidence in the integrity of the Judicial Process

CONCLUSION

For the reasons set forth above, Petitioner respectfully urges this Honorable Court to grant its Writ of Certiorari to review the judgment and opinion of the Court of Appeals below. In the alternative, if this Court elects not to address

the issues presented in this Petition at the present time, it is respectfully requested that the Writ issue and that the matter be remanded to the Fourth Circuit Court of Appeals for redetermination in light of this Court's opinion in *Liljeberg v. Health Services Acquisition Corp, Supra*; the Fourth Circuit's own opinions in *In re Rodgers, Supra* and *United States v. Sartori, Supra*; and ABA Canons of Judicial Ethics 3C(1)(b).

Respectfully Submitted,



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This 1 Day of April, 1994

APPENDIX

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 92-6549
UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

DAVID JACK VOGT, JR.,
Defendant-Appellant.

No. 92-6550
UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

DAVID JACK VOGT, JR.,
Defendant-Appellant.

Appeals from the United States District Court
for the Middle District of North Carolina, at Greensboro.
Frank W. Bullock, Jr., Chief District Judge:
Richard C. Erwin, Senior District Judge.
(CR-86-199-1-G, CA-91-237-2)

Submitted: January 11, 1994
Decided: February 23, 1994

Before HALL, PHILLIPS, and MURNAGHAN, Circuit Judges

Affirmed by unpublished per curiam opinion.

COUNSEL

Thomas F. Loflin, III, Durham, North Carolina, for Appellant. Robert H. Edmunds, Jr., United States Attorney, David B. Smith, Assistant United States Attorney, Karen I. Robbins, Third Year Law Student, Greensboro, North Carolina, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See I.O.P. 36.5 and 36.6.

OPINION

PER CURIAM:

In these consolidated cases, David Jack Vogt appeals the district court's dismissal of his 28 U.S.C. §2255 (1988) and a Fed. R. Crim. P. 35 motion for reduction of sentence. Vogt was convicted of a RICO violation under 18 U.S.C. §1962(a) (1988) and of conspiring to defraud the government in violation of 18 U.S.C. §371 (1988).* He was a United States customs officer who struck a deal with a smuggler, Keidaish. In return for substantial sums of money, Vogt gave Keidaish information useful to his smuggling operation.

*This Court affirmed the convictions on both counts. *United States v. Vogt,* 910 F.2d 1184 (4th Cir. 1990).

In his petition, Vogt complained that he was denied a fair trial because the trial judge failed to recuse himself; his conviction was obtained in violation of his right against self-incrimination because the Government used information derived from a prior grant of state and federal immunity; his conviction was obtain by an unconstitutional failure of the prosecutor to disclose exculpatory impeachment evidence; trial counsel was ineffective in that he failed to object to prosecutorial misconduct and count three in the superseding indictment.

The magistrate judge recommended that the petition be dismissed. After de novo review, the district court adopted the magistrate judge's recommendation. We affirm.

Vogt first claimed that his right to a fair and impartial trial was violated because the trial judge failed to recuse himself. The claim is based on the fact that the trial judge was once the law partner of one of fifty-some witnesses at the trial. The former partner testified to the closing of several real estate transactions. The magistrate judge determined that Vogt's claim did not state a "fundamental defect which inherently results in a miscarriage of justice," *United States v. Addonizio*, 442 U.S. 178, 185 (1979). Nor did Vogt meet the constitutional test for the disqualification of a judge. The judge did not have a "direct, personal, substantial, [and] pecuniary" interest in the matter being litigated. *Aetna Life Ins. Co. v. Lavoie,* 475 U.S. 813, 824-26 (1985). We agree and find Vogt's argument meritless.

Vogt's claim that his right to be free from self-incrimination was violated because the Government used information derived from a prior grant of immunity had no

merit. Vogt was deposed on February 14, 1979, by an internal affairs agent of the custom service. During the deposition, the agent extended "use and fruits" immunity. Vogt denied any illegal relationship or improper dealings. The magistrate judge found that nothing could have been used against him at trial because Vogt revealed nothing incriminating. He made no showing that this grant of immunity was breached. Nor was counsel ineffective in failing to raise this meritless claim.

Next Vogt complained that the prosecutor failed to disclose favorable evidence as required by *Brady v. Maryland*, 373 U.S. 83 (1963). The favorable evidence was an alleged statement by Peter Burt, one of Keidaish's partners and a principle witness against Vogt. Burt apparently said during one interview in 1987 that he did not believe Keidaish paid Vogt anything. Evidence concerning the credibility of a witness is covered by the *Brady* rule. *Jean v. Rice*, 945 F.2d 82, 87 n.9 (4th Cir. 1991).

The magistrate judge asked Vogt to attached a copy of the alleged interview. Vogt never produced a copy and thus the claim remained unsubstantiated. As the magistrate judge noted, however, even if the statement existed, it could have been impeached easily by Burt's 1983 trial testimony to the contrary. Burt's undisclosed 1987 statement could not undermine confidence in the outcome of the trial.

Finally, Vogt asserted that trial counsel was ineffective in failing to object to prosecutorial misconduct and count three of the indictment. To show ineffective assistance of counsel, Vogt must show both that his attorney's performance fell below an objective standard of reasonableness and that but for counsel's errors, the outcome of the trial would have been

different. *Strickland v. Washington,* 466 U.S. 688, 694 (1984).

Vogt identified fourteen statements in the prosecutor's closing argument which he characterized as inaccurate. He also accused the prosecutor of a number of statements Vogt claimed injected the prosecutor's credibility into the case. Finally Vogt accused the prosecutor of discussing exhibits which were not entered into evidence. The prosecutor was not guilty of misconduct. *See United States v. Young,* 470 U.S. 1 (1985). Trial counsel's failure to object did not prejudice Vogt.

Similarly, Vogt's claim that counsel was ineffective in failing to object to count three of the indictment has no merit. We have previously held that the indictment was sufficient. *United States v. Vogt,* 910 F.2d 1184, 1201 (4th Cir. 1990). Because Vogt had full notice of the charge against him, *Hagner v. United States,* 285 U.S. 427 (1932); *Finn v. United States,* 256 F.2d 304, 307 (4th Cir. 1968) he was not prejudiced in his defense and cannot show that but for counsel's alleged error, the outcome of the trial would have been different.

Accordingly, we affirm the district court' dismissal of Vogt's §2255 petition and his motion for reduction of sentence. We also deny his motion for release pending appeal. We dispense with oral argument because the facts and legal contentions are adequately presented in the material before the Court.

AFFIRMED

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
GREENSBORO DIVISION

DAVID JACK VOGT, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

2:91CV00237
Cr-86-199-01-G

(Filed May 1, 1992)

O-R-D-E-R

On February 19, 1992, in accordance with 28 U.S.C. §636(b), the Recommendation of the United States Magistrate Judge was filed and notice was served on the parties in this action and a copy was given to the Court..

Within the time limitation set forth in the statute, counsel for petitioner objected to the Recommendation.

The Court has appropriately reviewed the portions of the Magistrate Judge's report to which objection was made and has made a de novo determination which is in accord with the Magistrate Judge's report. The Court therefore adopts the Magistrate Judge's recommendation.

IT IS THEREFORE ORDERED that:

(1) The undersigned Judge finds no basis for his disqualification; and

(2) Petitioner's §2255 motion, in all its parts, is found to be without merit and is DENIED and DISMISSED.

A judgment dismissing this action will be entered simultaneously with this Order.

/s/ RICHARD C. ERWIN
United States District Judge

May 1, 1992

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
GREENSBORO DIVISION

DAVID JACK VOGT, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

2:91CV00237
Cr-86-199-01-G
(Filed Feb. 19, 1992)

ORDER AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

Before the Court for determination are several motions filed by David Jack Vogt, Jr., including (1) a §2255 motion challenging his convictions in this court; (2) a Rule 35 motion requesting a reduction in sentence; (3) a motion to disqualify United States District Judge Frank W. Bullock, Jr., and all district judges and magistrate judges of this district from ruling on the §2255 motion; and (4) a motion to disqualify Judge Bullock and all district judges and magistrate judges of this district from ruling on the Rule 35 motion. The United States has responded in opposition, and all motions are ready for a ruling.

1. The history of this case.

Petitioner Vogt and codefendants William Carl Ray and Burton R. Levey were indicted by a grand jury for this district in October 1986. Count One of the indictment charged the

defendants with conspiring to impede and defeat the lawful functions of the Department of the Treasury in violation of 18 U.S.C. §371. Count Two charged defendant Ray with perjury before the grand jury. Vogt retained attorneys Harry M. Solomon and Joel Hirschorn of Miami, Florida to represent him.

On January 5, 1987, a superseding indictment added charges against the defendants. Count One charged a violation of 18 U.S.C. §1962(a). Count Two alleged a conspiracy of the three defendants in violation of 18 U.S.C. §1962(d). Count Three described a conspiracy of the defendants in violation of 18 U.S.C. §371. And Count Four stated the perjury charge against defendant Ray. Vogt was arraigned on the three charges against him on January 8, and entered pleas of not guilty.

On April 6, 1987, the jury trial of the three defendants began before United States District Judge Frank W. Bullock, Jr. On June 18, after nearly a three-month trial, Vogt was convicted by the jury on two counts--violation of 18 U.S.C. §1962(a), and violation of 18 U.S.C.§371. Codefendants Ray and Levey were found not guilty of the charges against them. Judge Bullock later entered a forfeiture order against Vogt, the parties having waived a jury on that issue.

After Judge Bullock denied motions for a new trial or acquittal, he sentenced Vogt on Count One (the §1962 [a] violation) to imprisonment for 20 years and a fine of $25,000.00, and on Count Three (the §371 violation) to a consecutive term of 5 years imprisonment and a fine of $10,000.00. Vogt appealed his convictions to the Fourth Circuit Court of Appeals. Before that Court, he raised (1) a statute of limitations defense as to Counts One and Three, (2)

insufficiency of the evidence on both counts of conviction, (3) various evidentiary errors, and (4) jury instruction errors. After oral argument, his attorney raised the issue of the legal sufficiency of Count Three of the indictment. The Fourth Circuit Court of Appeals found no reversible error and affirmed the convictions on July 26, 1990. *United States v. Vogt,* 910 F.2d 1184 (4th Cir. 1990). The Court of Appeals denied rehearing, and the United States Supreme Court denied a petition for a writ of certiorari on February 19, 1991.

2. The motions to disqualify Judge Bullock and all district judges and magistrate judges of this district from entertaining the §2255 and Rule 35 motions.

Before entertaining the §2255 and Rule 35 motions on the merits, the Court must first consider the disqualification motions. Petitioner Vogt contends that Judge Bullock should have recused himself at trial under 28 U.S.C. §§144 and 455(a) and (b)(1), (2), and (3). Vogt makes this failure to recuse the first claim of his §2255 motion. He also contends that neither Judge Bullock nor any member of this court should now rule on his §2255 and Rule 35 motions, but all should recuse themselves.

28 U.S.C. §144 provides as follows:

> Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.

28 U.S.C. § 455(a) and (b)(1), (2), and (3) state:

(a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(2) Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

(3) Where he has served in governmental employment and in such capacity participated as

> counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy.

Substantively, §144 and §455, pertaining to recusal and disqualification of judges, are similar in import. *See United States v. York*, 888 F.2d 1050, 1053 (5th Cir. 1989). The standard for recusal or disqualification is that of the "reasonable man": if a reasonable man would believe that a judge should know of facts which would give even an appearance of impropriety to his sitting in a case, the judge should recuse himself. *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 858-59 (1988). In reviewing a request for disqualification, a judge is not required to accept bare allegations as true. *In re Beard*, 811 F.2d 818, 827 (4th Cir. 1987). "The proper test to be applied is whether another with knowledge of *all* of the circumstances might reasonably question the judge's impartiality." *Id.* at 827 (emphasis added).

With this test in mind, the Court will review Vogt's allegations and other pertinent circumstances shown by the record. Vogt alleges that Judge Bullock failed to disclose to the parties at trial that he had a conflict of interest. This conflict alleged arose because Judge Bullock was formerly (in 1982 and before) a member of the law firm that represented several individuals and corporate entities involved in the case. These are said to include Harvey G. Mitchell, Jr.: David Jack Vogt, Jr. (petitioner); David Jack Vogt, Sr.; Darryl Myers; Chardon Company NV; Real Tech International, Limited; and Colonial Manor Apartments.

Vogt's second allegation of conflict stems from the fact that one of Judge Bullock's former law partners, Robert

Douglas, was involved at one time in the representation of the above-named individuals and entities, and testified at trial as a "material government witness." (Petitioner's Motion, Ground One.) As a third allegation, Vogt states that during trial Judge Bullock ruled on claims of attorney-client privilege with respect to a number of documents subpoenaed from his former law firm.

Fourth, Vogt contends that Judge Bullock was biased against him and expressed his opinion on the merits of the criminal case early in the proceedings. Specifically, Vogt points to Judge Bullock's statement, "Were this a civil case, I would urge you very strongly to get together and settle it." (Tr. Vol. XI, p. 128). As further evidence of bias, Vogt points to numerous rulings that were unfavorable to him. Vogt alleges that bias is evident in Judge Bullock's finding that Mitchell, a "long-time law firm client" was credible. Fifth, Vogt alleges that bias is shown because Judge Bullock sentenced him to consecutive maximum terms, far above the national average sentences for the offenses of conviction.

On the basis of these allegations, Vogt contends that Judge Bullock should have disqualified himself at trial. He argues that Judge Bullock and all judges of this court should now recuse themselves from further participation in this case.

In considering a disqualification motion, a court may consider other pertinent circumstances in addition to those presented by the party requesting recusal. *See In re Beard,* 811 F.2d at 827. In section 3(a) of this opinion, the Court reviews in detail Vogt's claim of conflict of interest on the part of Judge Bullock. Here, it is sufficient to note simply that most of Vogt's allegations arise from the fact that Judge Bullock, prior to taking the bench in 1982, was a member of

the law firm of Douglas, Ravenel, Hardy, Crihfield, and Bullock (the "Douglas firm"). Perhaps Vogt's central allegation of conflict is that Robert Douglas, a partner of that firm, testified as a witness for the government at Vogt's trial. Vogt alleges that Judge Bullock "failed to disclose" this potential conflict to the parties (the three defendants facing trial).

With respect to this alleged failure to disclose, the Court observes that Judge Bullock's former affiliation with the Douglas firm was a public fact well-know to Greensboro (and other) lawyers, including several counsel who represented the jointly tried defendants. An initial circumstance the Court takes notice of, therefore, is that the alleged conflict of interest which Vogt complains of four years after his trial was a matter of general knowledge at the time of trial, yet no objection was made to Judge Bullock's presiding over the case.

(a) The motions to disqualify all district judges.

In his motions to disqualify Judge Bullock from ruling on his postconviction motions, Vogt also seeks to disqualify all members of this court. He argues that Judge Bullock should be disqualified under §455 because of the conflicts described above. With respect to other district judges of this court, Vogt asserts that "It would be difficult, if not impossible, to receive a fair and unbiased decision from another District Court Judge in the Middle District of North Carolina." (Affidavit, Ground One.) He grounds this conclusion upon assertions that (1) Judge N. Carlton Tilley was his codefendant's counsel during trial,

(1) Chief Judge Richard C. Erwin

> was involved in deciding issues relating to Grand Jury Subpoenas issued to Judge Bullock's former law firm requesting documents involving attorney-client privilege. At one such hearing, Judge Erwin ordered my attorney, William C. Ray, excluded from participating in those hearings. Additionally, Judge Erwin may be a witness at any future trial as to the question of how documents he ruled exempt from disclosure to the Grand Jury under attorney-client privilege, ended up in the government's discovery files,

and (3) Judge Hiram H. Ward was involved in resolving a civil case between petitioner and the Bank of Montreal and decided that case "unjustly."

On consideration of petitioner's claims and allegations, and for reasons set forth below, the Court recommends that petitioner's §2255 and Rule 35 motions be considered and ruled upon by the chief judge of this district. Quite obviously, no ground exists for recusal or disqualification of Chief Judge Erwin under §144 or §455(b). There is absolutely no suggestion of extrajudicial bias that could call for serious §144 consideration. *See United States v. Gordon,* 634 F.2d 639 (1st Cir. 1980) (alleged bias must stem from extrajudicial source to support request for disqualification). Vogt's allegations regarding Chief Judge Erwin, set out in full above, lend no support to a §455(b) motion because there is no showing of extrajudicial bias, no showing of personal knowledge of evidentiary facts, no showing of conflict arising out of prior private practice, and no showing that Chief Judge Erwin, in

any capacity as a government employee, participated as counsel, adviser, or a material witness concerning the proceeding. *See* 28 U.S.C. §455(b)(1), (2), and (3).

Vogt's motions to disqualify all district judges of this district apparently rest upon an exaggerated reading of § 455(a). That section provides that a judicial officer shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned. Vogt alleges that "brother judges" of Judge Bullock interact with him daily. From this, he concludes that it is manifestly impossible for one of these judges to rule fairly on his postconviction motions.

Section 455(a) mandates disqualification where an appearance of partiality might reasonably appear. No such "appearance" arises from the mere fact that the district judges in question all sit in the same district. There is no constitutional basis for a disqualification argument since the judges have no "direct, personal, substantial [and] pecuniary" interest in Vogt's case. *See Aetna Life Insurance Co., v. Lavoie*, 475 U.S. 813, 824-26 (1985). Vogt cannot meet the §455(a) statutory test for disqualification since it cannot be said that a reasonable person would question the impartiality of one district judge simply because another judge of that court may choose to recuse himself when allegations of conflict are directed toward him.

(b) The motions to disqualify all magistrate judges.

Vogt's §455(a) motions are also directed toward the magistrate judges of this court, seeking their disqualification because their supervisory and superior judges are all targets of the disqualification motions. Vogt's legal position is frivolous.

No judge or magistrate judge is disqualified automatically from further participation in a case merely by reason of the filing of a §455 motion. *See Grand Entertainment Group, Ltd. v. Arazy*, 676 F. Supp. 616 (E.D. Pa. 1987). In fact, to the contrary, a judge is required to rule on such a motion directed toward him or her. *See United States v. Kelley*, 519 F. Supp. 1029 (D. Mass. 1981).

The test for disqualification of magistrate judges is, of course, the same as that for district judges. Here, there is no assertion of any ground for disqualification other than that the disqualification of all district judges of this court is sought. As shown above, that relief is not appropriate. Consequently, petitioner's §455(a) motions directed toward magistrate judges fail, as well. There exists no objective, reasonable basis for calling into question the impartiality of the undersigned magistrate judge in participating in this case. The motions for disqualification are DENIED insofar as they are directed to the undersigned.

(c) The motions to disqualify Judge Bullock.

The motions to disqualify are directed in the first instance to Judge Bullock.[1] As shown hereafter in the discussion on the merits of Vogt's §2255 motion, Vogt received a fair and unbiased trial, absolutely unaffected by any alleged conflict of interest by Judge Bullock. Nevertheless, the question concerning recusal by Judge Bullock at this stage of the proceeding (i.e., ruling on the §2255 and Rule 35 motions) is

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[1]Ordinarily, postconviction motions are ruled upon by the same district judge who conducted the trial of the matter. *See* Rule 4, Rules Governing §2255 Proceedings.

a broader one. The test under §455(a) is whether a reasonable person might question the impartiality of a judge under the circumstances of the case. Where, as here, specific claims of conflict of interest are made, recusal certainly lies with the discretion of the judge.

In sum, with respect to the disqualification motions, IT IS ORDERED that the undersigned magistrate judge finds no basis for recusal or disqualification and declines recusal. IT IS RECOMMENDED that Judge Bullock recuse himself under §455(a) to avoid even the appearance of partiality, although, as shown below, no partiality, bias, or actual conflict of interest on his part exists in this case. FURTHER, IT IS RECOMMENDED that Chief Judge Richard C. Erwin decline recusal and entertain petitioner's §2255 and Rule 35 motions on the merits.

3. The §2255 motion.

In his motion pursuant to 28 U.S.C. §2255, Vogt alleges that his 1987 convictions violated his rights in several respects. The petition, filed pro se although counsel has now entered a representation for Vogt, identifies seven claims. Vogt claims that (1) his right to a fair and impartial trial was violated because of Judge Bullock's failure to disqualify himself; (2) he was denied effective assistance of counsel due to his attorneys' failure to object to acts of prosecutorial misconduct during closing argument; (3) the prosecutor failed to disclose evidence favorable to the defendant; (4) his convictions were obtained in violation of the double jeopardy clause due to the government's use of evidence upon which petitioner had received a grant of immunity; (5) he was denied effective assistance of counsel due to counsels' failure to object to Count Three of the indictment for failure to state a

crime; (6) his convictions were obtained in violation of the protection against double jeopardy due to a prior prosecution; and (7) his convictions violate the double jeopardy clause due to the use of evidence on which he had received immunity from a Florida grand jury. The parties have fully briefed their positions on these seven claims.

(a) Claim (1)--petitioner's right to a fair and impartial trial was violated because of Judge Bullock's failure to disqualify himself.

Petitioner Vogt presents a number of allegations in support of his claim that Judge Bullock should have disqualified himself prior to trial under 28 U.S.C. §144 and §455. He alleges that (1) Judge Bullock was a member of the Douglas law firm during the period of time that the firm represented individuals and entities involved in the criminal proceeding, including Harvey G. Mitchell, Jr., David Jack Vogt, Jr., David Jack Vogt, Sr., Darryl Myers; Chardon Company, NV, Real Tech International Limited, and Colonial Manor Apartments; (2) Robert Douglas, Judge Bullock's former law partner, was a material government witness; (3) Judge Bullock ruled during trial on questions of attorney-client privilege on documents subpoenaed from his former law firm; (4) Judge Bullock expressed his opinion on the merits of the case early in the proceeding; (5) Judge Bullock showed bias in ruling against petitioner on many issues; and (6) Judge Bullock showed bias in sentencing him to a maximum term.

The Court has carefully reviewed the transcript of trial and the arguments of the parties and finds, for reasons set forth below, that Vogt's first claim under §2255 is without merit and should be dismissed.

First, the Court notes that allegations (5) and (6) of "bias" shown by rulings and by the sentence imposed, raise no issue of "extrajudicial" bias, and therefore do not raise a substantial disqualification issue. *See, e.g., In re International Business Machines Corp.,* 618 F.2d 923 (2d Cir. 1980) (unfavorable rulings by a judge do not provide a basis for determination of personal bias or prejudice under the federal recusal statutes); and *United States v. Bakker*, 925 F.2d 728, 740 (4th Cir. 1991) (sentencing is within the court's discretion and is bounded only by the laws and by considerations of due process). Moreover, review of the transcript demonstrates conclusively that the trial judge presided over the case in a fair and even-handed manner. Absolutely no inference of bias arises from the hundreds of rulings made before, during, and after trial, some favorable to the prosecution and some to the defendant. Nor does the fact of a maximum sentence suggest bias under the circumstances of this case. Petitioner Vogt was a Untied States Customs Officer during the time period covered by the indictment. He grossly abused his position of trust and accepted hundreds of thousands of dollars in bribe money in exchange for information useful to a ring of drug smugglers. Vogt may divine "bias" because he was sentenced above the national average for his statutory offenses, but the Court certainly draws no such inference.

In allegation (4), Vogt asserts that the judge expressed his opinion early in the case by saying to the parties, "Were this a civil case, I would urge you very strongly to get together and settle it." (Tr. Vol. XI, p. 128.) This statement on its face is equivocal and does not indicate any prejudgment of Vogt. Moreover, that statement was made in the context of the judge's observation that the trial was going to a protracted one, making it readily understandable why he would urge settlement if the case were civil in nature. The judge

completed the sentence quoted by Vogt by saying, "but since it is not a civil case, I will see you again at 9:30." A reading of the full transcript shows conclusively that the trial judge did not prejudge the government's case or Vogt's defense. In any event, the twelve-person jury, not the trial judge, found Vogt guilty beyond a reasonable doubt.

Allegations (1), (2), and (3) are all a part of Vogt's contention that Judge Bullock was under a conflict of interest at trial that required his disqualification. There is no allegation (nor could there be) that Judge Bullock knew anything, or had any information about any matter related to the case as a result of his former practice with the Douglas firm. In fact, there is absolutely no suggestion in the record that Judge Bullock even knew that such persons as Mitchell, Vogt, and Myers or such entities as Chardon Company, Real Tech, and Colonial Manor Apartments were real-estate clients of the firm while he was in private practice. Still, Vogt contends that the judge was required to recuse himself under the provisions of 28 U.S.C. §§455(a) and (b)(2). Section 455(a) requires that a judge shall recuse himself in any proceeding which his impartiality might reasonably be questioned. Section 455(b)(2) requires (as it applies here) that a judge shall recuse himself where a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or such lawyer has been a material witness concerning it.

Counsel for Vogt argues that the case of *In re Rogers*, 537 F.2d 1196 (4th Cir. 1976), is indistinguishable from the case at bar and mandates a finding that Judge Bullock should have recused himself and that Vogt's convictions should now be set aside. (*See* Memorandum of Law filed August 26, 1991.) In

view of this contention, the Court will carefully review *In re Rogers.*

In *In re Rogers,* the Court of Appeals entertained a petition for a writ of mandamus from defendants in a criminal trial pending (and not yet tried) in the District of Maryland. The defendants, including Rogers, alleged that the district judge erred when he declined to recuse himself from presiding over a criminal trial against them on charges of mail fraud and racketeering. The Court of Appeals granted the writ, finding that the trial judge's disqualification was mandated by 28 U.S.C. §455(b)(2). That section requires recusal in circumstances "[w]here in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it."

Rogers alleged that Richard W. Case, a former law partner of the judge, represented Pimlico race track during the time that Case and the judge were members of the same firm. Case conferred with the owners of Pimlico concerning consolidation of Maryland's one-mile tracks and also about making an offer to purchase the Marlboro track. Case continued representing Pimlico even after the judge left the firm and he participated in drafting a consolidation bill that was adopted by the Maryland Legislature. He also prepared an offer to purchase the Marlboro track which was rejected. It was acknowledged that Case did nothing improper or illegal.

Rogers and the other petitioners were also interested in the consolidation bill and in purchasing the Marlboro track. The

criminal charges against them were based upon their allegedly unlawful activities in support of the consolidation bill.

It was apparent that Case would be called at trial to testify about matters that occurred while the trial judge was a firm member. (It was undisputed that the judge knew nothing of the matters in controversy). It was a part of the defense theory that the defendants' conduct was no more culpable than the conduct of the Pimlico owners, who were represented by Case during the time period in question. The defendants intended to use the lawyer's testimony to demonstrate the legitimacy of their own actions and goals.

On this record, the Court of Appeals held that the trial judge was required to recuse himself. Even accepting the government's argument that "matter" and "matter in controversy," as those terms are used in §455(b)(2), mean the actual case before the court and not some broader concept, the Court nonetheless found that Case, the former law partner, had testimony to give concerning this "matter." The case before the trial court consisted not only of the prosecution's evidence and theory, but also the defense asserted by the accused. The defendants' strategy clearly was to make use of evidence of matters in which the judge's former law partner had served as a lawyer. These circumstances fell within the reach of §455(b)(2), and recusal of the judge prior to trial was therefore required.

Petitioner Vogt contends that *In re Rogers* mandates that his 1987 convictions in this court be set aside under 28 U.S.C. §2255 because Judge Bullock should have disqualified himself on the ground that Robert Douglas, the judge's former partner, was to be a witness at trial. After careful consideration, the Court does not agree. The standard of review under 28 U.S.C.

§2255 is for (1) constitutional error, or (2) non-constitutional error involving a fundamental defect which inherently results in a complete miscarriage of justice. Neither sort of error occurred here.

Petitioner Vogt was convicted in this case of using proceeds of a pattern of racketeering in an enterprise affecting interstate commerce. (Count One.) The racketeering was that he corruptly received things of value in return for doing acts in violation of his duties as a Customs Officer. He was also convicted of conspiring to impede the lawful functions of the Internal Revenue Service. (Count Three.) The government's evidence tended to show that Vogt accepted bribe money from smugglers in exchange for information, concealed the money in off-shore accounts and domestic and off-shore corporations, used trust accounts of codefendants, and invested money in acquiring assets in Florida and North Carolina. The defense denied the racketeering and denied that the asset acquisitions were a part of "money laundering."

The trial of Vogt's case lasted for eleven weeks. Scores of witnesses testified, and the trial transcript encompasses 45 volumes. Undoubtedly, in the midst of all this testimony, the critical testimony that led to Vogt's conviction was that of Phillip Keidaish. Keidaish testified that he was a drug smuggler and that he had paid hundreds of thousands of dollars to Vogt for confidential information concerning operations of the United States Customs Service. Other evidence offered by the government showed a trail of money stemming from these bribes that led to eventual acquisition of assets by Vogt. Some of the assets were acquired through real estate purchases in North Carolina.

It was at this point that Robert Douglas's testimony was presented by the government. There is no suggestion that Judge Bullock knew that Douglas would be a witness until he read to the jury the lengthy government witness list on the first day of trial. (Tr. Vol I. pp. 11-14.) Douglas was one of over 100 government witnesses. Several others of these were also Greensboro attorneys (e.g., William Aycock and Eric Handler). No party raised a question concerning Douglas's role as a witness or the trial judge's former association with the Douglas firm.

Attorney Douglas testified that in the years 1978 through 1980 he represented Vogt and associated persons and entities in real estate closings and related matters. He identified documents and testified concerning real estate transactions involving Colonial Manor Apartments and the Groometown Road property in Greensboro. In none of the documents or testimony did Douglas provide evidence suggesting a "corrupt" source of funds involved in the transactions or an improper "laundering" purpose by any party to the transactions. His testimony, both on direct and under cross-examination, simply described the legal and financial aspects of the real estate transactions.

Review of the record in this case shows that Douglas's testimony was little more than ministerial in nature. fleshing out the details of the closings. Douglas did not give testimony relating to the government's theory of bribery and improper conversion of assets. He did not give testimony that limited in any fashion the defenses maintained by petitioner Vogt. Indeed, his testimony was so noncontroversial that all defense attorneys, upon being advised (by Douglas) that one of the jurors had sought representation by him in a real estate closing during the trial, insisted that absolutely no problem was

created by the juror's contact with Douglas. (*See* T. Vol XVI, pp. 141-145.)

The Court finds that the circumstances in the case at bar are distinguishable from those in *In re Rogers*. Most important, the question of whether there should be disqualification arises *four years after trial*, not prior to trial, and the standard of review is now governed by 28 U.S.C. §2255, not 28 U.S.C. §455. The trial record is now made, and the import of a witness's testimony need not be speculated about; it is established. Attorney Douglas gave no testimony that contributed to the government's theory of the case or detracted from the defense's strategy. He merely described several real estate closing and the transfers of funds and assets involved therein. Douglas's role therefore contrasts sharply with that of the former law partner of the trial judge in *In re Rogers* who was to be called by the defense to testify on a matter directly in issue, a matter that went to the defense's theory that the conduct of the defendants was not wrongful and was the same as that of other persons.

The standard of review under §2255 is for error of constitutional dimension and non-constitutional error that involves a "fundamental defect which inherently results in a complete miscarriage of justice." *United States v. Addonizio*, 442 U.S. 178, 185 (1979). In *United States v. Morrow*, 914 F.2d 608, 614 (4th Cir. 1990), the Court of Appeals defined non-constitutional claims cognizable under §2255 as those that involve a "complete miscarriage of justice or [are] inconsistent with rudimentary demands of fair procedure."

Vogt's claim does not raise a constitutional question. The constitutional test for disqualification of a judge is whether the judge has a "direct, personal, substantial, [and] pecuniary"

interest in the matter being litigated. *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813, 824-826 (1985). Vogt has not alleged such an interest in the litigation on Judge Bullock's part.

Nor has Vogt raised a claim that rises to the level of "fundamental defect," "complete miscarriage of justice," or inconsistency with "rudimentary demands of fair procedure." Vogt was convicted by a jury of twelve persons after a three-month's trial. Review of the transcript shows that counsel for Vogt (and counsel for the codefendants) performed to the highest standard of professional competence. The trial judge was scrupulously fair to all parties, diligent, and untiring in presiding over the lengthy trial of the case. Indeed, counsel for one of the defendants at the close of trial thanked the Court for its patience and remarked, "I've tried probably not as many cases as either of my co-counsel, but in my experience I've never seen the Court work harder, more diligently, and I just want to say that on the record." (Tr. Vol XXXXV, p. 24.)

Petitioner Vogt received a trial that was fundamentally fair. The trial Court's proceedings were affirmed on appeal by the Fourth Circuit Court of Appeals and the United States Supreme Court denied certiorari review. The Court views it as a testament to the inventiveness of the human mind (and certainly to the amount of free time available to an incarcerated prisoner) that petitioner Vogt should produce the extravagant claims and the voluminous motion papers he now presents. The trial transcript, read fairly and completely, contains not one shred of suggestion of bias or actual conflict on the part of the trial judge.

Vogt makes additional allegations of conflict of interest that may be quickly dismissed in light of the extensive discussion above. He asserts, in allegation (1) under this claim, that Judge Bullock should have recused himself because he was a member of the Douglas firm while it represented persons and entities involved in the criminal case. This allegation is a close relative to the allegation regarding attorney Douglas as a witness and is based on the same facts. The allegation fails for all of the reasons set forth above.

Finally, in allegation (3) petitioner Vogt contends that Judge Bullock had a conflict of interest in ruling on a claim of attorney-client privilege with respect to documents subpoenaed from his former law firm. Vogt cites the trial transcript at Tr. Vol. XVII, pp. 151-53 and Vol XXI, at pp. 111-16, 121-41 and 150. Review of these sections shows, however, that counsel for Vogt amended his objection to a certain document from an objection based upon the attorney-client privilege to one based upon the hearsay rule. (Tr. Vol. XXI, p. 132.) The judge excluded the portion of the document to which the objection was made. (Tr. XXI, P. 135.) Thus, Vogt's allegation (3) adds nothing to his claim of conflict of interest by the trial judge. For reasons discussed above, Vogt's allegation would not, in any event, call into question the fundamental fairness of his trial.

The Court finds that petitioner's first §2255 claim is without merit. His constitutional rights were not violated in any manner. No allegation of statutory, non-constitutional violation raises a colorable issue of fundamental defect or miscarriage of justice in light of the full record herein. Claim (1) should be dismissed.

(b) Claim (2)--petitioner was denied effective assistance of counsel due to his attorneys' failure to object to acts of prosecutorial misconduct during closing argument.

Petitioner Vogt contends that he was denied effective assistance of counsel because his attorney failed to object to alleged acts of misconduct by the prosecutor, David B. Smith, during closing argument. Vogt directs the Court's attention to several alleged misstatements by the prosecutor during argument. The first alleged misstatement may, for purposes of discussion, be considered a fair example of all the allegations.[2] Vogt alleges That Smith deliberately misstated an important fact regarding the testimony of witness Phillip Keidaish. Smith argued at one point , "Phillip Keidaish never said he needed David Vogt to be on duty for anything." (Tr. XXXXII, p. 56.) Vogt now points to a portion of Keidaish's testimony wherein he said under cross-examination:

> Q. Now was it important for the success of your mission for David Vogt to be on duty or in service when you were flying a load?
>
> A. Yes.
>
> Q. Would you have flown a load if he was in the Cayman Islands on the day the load was supposed to be coming in. for example?

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[2]Vogt also claims that Prosecutor Smith argued about tax returns that were not covered by the indictment and injected his own credibility into his closing argument. The specific alleged mischaracterizations of fact or law by the prosecutor are set out in Exhibit E to the petition. For reasons set forth in this opinion, none of these allegations raise a serious issue of attorney incompetence or prejudice to Vogt.

A. No.

...

Q. And, of course, you earlier told this jury it was important for David Vogt to be on duty or in service; correct?

A. Yes sir.

Q. I mean, otherwise, it wouldn't do much good to pay a man who was not on the job for you; right?

A. Yes, sir.

(Tr. Vol. IV, pp. 206-207, 211)

Petitioner contends that his attorney was incompetent for failing to object to the alleged misstatement by the prosecuting attorney concerning the trial testimony.

In order to show that counsel was ineffective under the Sixth Amendment standard, Vogt must meet the two-prong test of *Strickland v. Washington*, 466 U.S. 668 (1984). He must show (1) that counsel's performance fell below an objective standard of reasonableness, and (2) that he was prejudiced as a result of the attorney's performance. In order to show prejudice, he must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. *Id.* at 694. In evaluating a claim of ineffective assistance of counsel, the Court is instructed by the Supreme Court's admonition that:

> Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy."

Id. at 689.

Review of the record shows that this case extended over many weeks of trial. Thousands of pages of testimony was given by a great number of witnesses. Argument by counsel consumed over 500 pages of transcript. Out of this huge volume of testimony and argument, petitioner Vogt has selected a handful of statements by the prosecutor he believes were inconsistent with the evidence or the law.

The jury was instructed by the trial judge to rely on its recollection of the evidence, not the recollections of the attorneys. (Tr. Vol XXXXII, pp. 102-103.) In light of this, and the latitude allowed for closing argument, petitioner's attorneys were not ineffective in failing to object to the matters raised by Vogt. Furthermore, Vogt's allegations do not approach a sufficient showing of prejudice; that is, they do not (singly or in combination) raise a colorable issue that there exists a reasonable probability that, but for counsel's alleged errors, the result of the proceeding would have been different. Much to the contrary, they suggest only that petitioner has combed the record to find the smallest of apparent inconsistencies, matters that clearly did not affect the outcome of his trial. The Court would also observe that the representation Vogt received from his attorneys was, as is amply demonstrated by the record, highly professional and far above the minimum level of competence required by the Sixth Amendment.

(c) Claim (3)--the prosecutor failed to disclose evidence favorable to the defendant.

In claim (3), petitioner Vogt contends that the prosecutor violated principles established in *Brady v. Maryland*, 373 U.S. 83 (1963), by failing to turn over to the defense evidence favorable to the accused. Vogt claims that the prosecutor failed to disclose that one of Phillip Keidaish's partners in drug-smuggling, Peter Burt, stated in 1987 to IRS Agent James Ruark that he "did not believe that Keidaish paid Vogt anything." Vogt asserts that Keidaish"s testimony was the principal evidence against him at trial, and that Burt's undisclosed evidence would have served to discredit Keidaish.

Although Vogt appeared to quote directly from a 1987 interview transcript in his §2255 motion (*see* Motion, Ground Three), he did not attach to the motion a copy of the alleged interview. For that reason, and to determine the context of any statement made by Burt, the Court ordered Vogt to file a copy of the interview document that he quoted from in his motion. On February 7, Vogt filed his response, by and through counsel. He advised that he did not have a copy of the alleged interview, and that he has never had or seen the interview. The source of his "quotation" from Burt, he said was Phillip Keidaish. Keidaish, while an inmate with Vogt after 1987, told Vogt about the alleged interview and told Vogt that Burt told him (Keidaish) that he had made the remark in question.

Obviously, the existence of any such remark by Burt, or even the 1987 interview, is a matter of conjecture at this point. The government has responded by saying that all interviews would have been a part of the discovery packet given to Vogt's counsel prior to trial. Vogt has presented no competent evidence that there has been any nondisclosure. The burden rests on Vogt to raise an issue of constitutional dimension by more than conclusory and conjectural allegations. He has failed in this regard. In any event, for reasons set out below, the Court finds that petitioner's rights were not violated, and he was not prejudiced, even if Burt once made the alleged remark to a government agent.

The *Brady* rule requires disclosure by the prosecutor of evidence which is material to the guilt or punishment of the accused. 373 U.S. at 87. Evidence concerning the credibility of a witness is covered by the *Brady* rule. *United States v. Bagley*, 473 U.S. 667, 676 (1985); *Giglio v. United States*, 405 U.S. 150 (1972). The standard for determining if a *Brady*

violation has occurred is whether there is a reasonable probability that the result of the proceeding would have been different had the evidence been disclosed to the defense. *United States v. Bagley*, 473 U.S. at 682. A reasonable probability requires a probability sufficient to undermine confidence in the outcome of the trial.

Vogt's allegations about Burt's 1987 statement, standing alone, might appear to have possible significance. Nonetheless, facts shown by the affidavit of attorney Roger A. Alcott (unchallenged by Vogt) demonstrate that Burt's 1987 statement, even if existent and made know to the defense prior to trial, would not have changed the result of the trial.

The Alcott affidavit shows that Vogt was prosecuted in the state courts of Florida in 1983 on charges of drug smuggling in association with Phillip Keidaish and Peter Burt. Alcott was the prosecuting attorney. During the trial, Vogt was represented by Joel Hirschorn, one of the attorneys for Vogt in the criminal trial in this case. Burt was called as a witness for the prosecution in the 1983 trial and was cross-examined by attorney Hirschorn regarding Vogt's role in the drug-smuggling operation. Burt testified that he complained to Keidaish about the large amounts of money paid to Vogt for information regarding investigations of the Customs Service. The records and transcripts of the 1983 prosecution remain with the Florida Court. (*See* Affidavit of Roger A. Alcott.)

Under these circumstances, it is apparent that any 1987 statement by Burt that he did not know of payments by Keidaish to Vogt could have had no significant impact on the criminal trial in this court. Attorney Hirschorn and the prosecutor knew of Burt's 1983 trial testimony and Burt would

have been easily and fully impeached (and subject to prosecution for perjury) had he attempted to give testimony exculpating Vogt. His testimony would have added nothing of value to the defense and could have served only to discredit the defense in the eyes of the jury. In the full context of all the evidence produced at trial, and the circumstances described above, Burt's alleged nondisclosed 1987 statement could not serve to undermine confidence in the outcome of the trial. Even assuming all that Vogt alleges under this claim to be true, there exists no reasonable probability that the result of the proceeding would have been different had the evidence in question (if it existed) been disclosed to the defense.

(d) Claim (4)--petitioner's convictions were obtained in violation of the double jeopardy clause due to the government's use of evidence upon which he had received a grant of immunity.

Vogt claims that his convictions violated the Fifth Amendment's prohibition against double jeopardy in that the government used testimony from Vogt's February 14, 1979 deposition taken by Internal Affairs Special Agent Thomas Sullivan of the Customs Service. During that deposition, Agent Sullivan extended to Vogt "use and fruits" immunity in exchange for his statements. In the deposition, Vogt repeatedly denied any illegal relationship or improper dealings with Keidaish. (See Deposition Transcript, Petitioner's Motion Under §2255, Exhibit G.)

The Court finds that Vogt's claim of double jeopardy violation fails for obvious reasons. There was nothing revealed in Vogt's deposition testimony in 1979 that was (or even could have been) used against him at trial. He flatly denied any wrongdoing. No witness at trial testified about

these denials or gave any testimony that grew out of these denials. (*See generally* the testimony of Thomas Sullivan, Vol IX.) Vogt does not suggest to this Court any manner in which his denials on deposition somehow led to evidence introduced against him at trial.

Second, Vogt's claim appears to be based upon a fundamental misunderstanding of the nature of the immunity extended to him by the special agent. In his motion, Vogt complains that the acts and events which were the subject of the charges against him in this case were exactly the matters he was asked about in the deposition. Vogt considers this a violation of his "immunity from Federal prosecution." That is not so. The immunity he was given did not extend to immunity from prosecution, but only immunity from use of the testimony he gave on one occasion in 1979, and he has made not the slightest showing that this grant of immunity was breached by the government.

Vogt also alleges that his trial attorneys were ineffective for failing to object to the prosecution against him as a violation of his grant of immunity. Since his immunity claim was frivolous, his attorneys were not unprofessional in failing to object on this ground. Petitioner's fourth claim for relief is without merit and should be dismissed.

(e) Claim (5)--petitioner was denied effective assistance of counsel due to counsels' failure to object to Count Three of the indictment for failure to state a crime.

Petitioner Vogt next claims that his trial counsel were ineffective because they did not timely object to Count Three of the indictment for failure to state a crime. Count Three charged Vogt with violating 18 U.S.C. §371, the general

conspiracy statute. The indictment reads in part that Vogt "did conspire...to commit offenses against the laws of the United States." The statute makes it illegal to "conspire either to commit any offense or to defraud the United States...." Count Three, throughout the remainder of its provisions, makes several references to Vogt having defrauded the United States in specific ways.

Section 371 has been read to create two separate offenses: one of conspiracy to defraud the United States, and one of conspiracy to commit any offense against the United States. *See e.g., United States v. Minarik*, 875 F.2d 1186, 1187 (6th Cir. 1989); *United States v. Vasquez*, 319 F.2d 381, 384 (3rd Cir. 1963). Since the "offense" clause of §371 requires a reference to another federal statute in order to state a crime and the indictment did not include language that the conspiracy was "to defraud the United States," Vogt alleges that Count Three does not effectively charge him with committing any crime. The government concedes that the charge did not track the "to defraud" language of the statute, but argues that the charge gave fair notice that the charge was brought as a *Klein* conspiracy[3] (a conspiracy to defraud the United States), all parties tried the case under that theory, and the jury instructions required proof of all elements of a conspiracy to defraud the United States.

Counsel for Vogt challenged the sufficiency of Count Three on direct appeal from Vogt's convictions. The Court of Appeals noted that no pretrial objection to the indictment had been made, and ruled that when a post-verdict challenge to the

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[3] *United States v. Klein*, 247 F.2d 908 (2d Cir.), *cert. denied*, 355 U.S. 924 (195).

sufficiency of an indictment is made, "every intendment is then indulged in support of...sufficiency." *United States v. Vogt,* 910 F.2d 1184, 1201 (4th Cir. 1990), *citing Finn v. United States*, 256 F.2d 304, 307 (4th Cir. 1958). The question under the liberal post-verdict test is "whether the necessary facts appear in any form or by a fair construction can be found within [the indictment's] terms." *Id.* at 1201 (citations omitted). Applying that test, the Court of Appeals found that many "words of similar import" to the statutory language "to defraud the United States" appeared in various places in Count Three. The Court therefore denied the challenge to the sufficiency of the indictment. Vogt now contends that his attorneys were incompetent in failing to *timely* object to Count Three prior to the verdict, so that the trial Court would have applied to the indictment the "stricter scrutiny" test of *United States v. Hooker*, 841 F.2d 1225 (4th Cir. 1988), and found the charge to lack an essential element of the crime.

The Court of Appeals has held that Count Three gave Vogt full and fair notice of the charge against him, and that his conviction under that charge should stand. In reaching this conclusion, the Court relied on *Finn*, and *Hagner v. United States*, 285 U.S. 427 (1932). In *Hagner*, the Supreme Court held that a post-verdict challenge to an indictment must fail when the indictment set out the facts in any forms, giving due notice by fair constructing so long as no prejudice is shown. 285 U.S. at 433. In *Finn*, the Court of Appeals for the Fourth Circuit reached the same conclusion noting that "while a defendant is not foreclosed by the verdict from raising the objection that the information fails to state an offense, the fact that he delayed raising the objection until it is too late to cure it by simple amendment, may be a consideration in judging the information's sufficiency." 256 F.2d at 307.

In this §2255 motion, petitioner's claim as to sufficiency of Count Three is now cast as an ineffective assistance of counsel claim. As such, under *Strickland v. Washington*, Vogt must show (1) that counsel's performance fell below an objective standard of reasonableness, and (2) that he was prejudiced as a result. Under the circumstances before the Court, Vogt cannot make this showing.

Finn, *Hagner*, and *Vogt* demonstrate that Vogt was not prejudiced in his defense. He had full notice of the charge against him and the case proceeded in all respects with Count Three interpreted by the Court and the parties as a *Klein* conspiracy charge. An earlier objection, as *Finn* emphasized would only have resulted in a simple amendment to the indictment, the grand jury having already found all of the elements of a *Klein* conspiracy. Vogt thus cannot meet the prejudice prong of *Strickland v. Washington*. Vogt cannot show a reasonable probability that but for counsels' alleged unprofessional error, the result of the proceeding would have been different. The ultimate focus of the *Strickland v. Washington* test is "fundamental fairness," 466 U.S. at 696, and Vogt clearly received that.

Since Vogt cannot show prejudice the court need not reach the question of the competence of counsel in this matter. *See Strickland v. Washington*, 466 at 697 (court need not decide if counsel's performance was deficient if it is clear that the defendant was not sufficiently prejudiced). Nonetheless, the Court would note that a criminal defendant is entitled only to competent counsel, not to perfect counsel who raises every conceivable constitutional claim. *See Engle v. Isaac*, 456 U.S. 107, 134 (1982). As the Court has previously noted, petitioner was represented by counsel who demonstrated their competence throughout the pretrial, trial, and appeal stages of

this action. Petitioner's fifth claim is without merit and should be dismissed.

(f) Claim (6)--petitioner's convictions were obtained in violation of the protection against double jeopardy due to a prior prosecution.

As his sixth claim, petitioner Vogt alleges that the federal charges brought against him in this case were based on the same conduct for which he was tried in Florida (for violation of Florida's RICO statute) and found not guilty. Therefore, he claims that his right to be free from double jeopardy has been violated.

Vogt's contention is without merit. Under the "dual sovereignty" doctrine, two different sovereigns, a state government and the federal government, can prosecute a defendant for the same conduct without violating the constitutional prohibition against double jeopardy. *Abbate v. United States*, 359 U.S. 187 (1959); *Heath v. Alabama*, 474 U.S. 82, 89 (1985); *United States v. Acantha*, 674 F.2d 260 (4th Cir. 1982). This Court made this precise ruling prior to trial, and the law in this regard had not changed. (*See* docket entries of February 19, 1987, and Transcript of Hearing of February 19. 1987.)

(g) Claim (7)--petitioner's convictions violate the double jeopardy clause due to the use of evidence on which he had received immunity from a Florida grand jury.

As a seventh and final claim, Vogt alleges that the federal government violated his right to be free from double jeopardy by using in this prosecution testimony that Vogt gave before a Florida state-wide grand jury in 1983 under a grant of

immunity. Vogt alleges that Assistant United States Attorney David Smith assisted with the Florida case and used it as a "sham" to gather evidence for later use in the federal trial. Vogt asks for an evidentiary hearing concerning this issue.

The Court finds, however, that Vogt has provided no factual basis for his claim. He has merely made conclusory, unsupported allegations. Smith has denied Vogt's allegations in a sworn affidavit. (*See* Affidavit of David B. Smith, Response filed September 24 1991, Exhibit C.) The government also directs the Court's attention to the previously filed affidavit of Roger Alcott, which refutes Vogt's speculations. (*See* Exhibit 1 to Response filed February 18, 1987.)

Vogt's conclusory allegations raise no issue of double jeopardy. Similarly, his claim that his trial attorneys were ineffective for failing to raise this issue at trial is without merit.

4. The Rule 35 motion.

Petitioner Vogt filed his Rule 35 motion on June 3, 1991, within 120 days of denial of his request to the Supreme Court for a writ of certiorari. Petitioner's Rule 35(b) motion is thus timely. *See* former Rule 35, applicable to offenses committed prior to November 1, 1987. The undersigned recommends that Chief Judge Erwin consider Vogt's Rule 35 motion and enter an order separate and apart from any order affirming, modifying, or rejecting the recommendations made herein.

CONCLUSION

For reasons set forth above, IT IS RECOMMENDED that,

1. Chief Judge richard C. Erwin entertain petitioner's §2255 and Rule 35 motions;

2. United States District Judge Frank W. Bullock, Jr., recuse himself from determining petitioner's post-conviction motions to avoid even an appearance of conflict of interest although in fact no actual prejudice would obtain should there be no recusal;

3. Petitioner Vogt's §2255 motion, in all its parts, be denied and dismissed; and

4. Chief Judge Erwin rule on Vogt's pending Rule 35 motion.

Further, IT IS ORDERED that the undersigned magistrate judge DENIES the motion to disqualify insofar as it is directed toward him.

/s/ Paul Trevor Sharp
United States Magistrate Judge

February 19, 1992

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
GREENSBORO DIVISION

DAVID JACK VOGT, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

2:91CV00237
Cr-86-199-01-G
(Filed Apr. 9, 1992)

O R D E R

BULLOCK, District Judge

Petitioner has moved to disqualify the undersigned from any further proceedings or rulings pertaining to Petitioner's motions under 28 U.S.C. §2255 and Rule 35, Federal Rules of Criminal Procedure. Petitioner contends that the undersigned had a conflict of interest and should have recused himself under 28 U.S.C. §455 from presiding at the Petitioner's 1987 trial on the grounds that one of the undersigned's former law partners represented several individuals and corporate entities involved in the case in real estate closing some years before; Petitioner also points to the testimony of the partner at trial concerning the real estate closing and also contends that the undersigned ruled on claims of attorney-client privilege with respect to documents subpoenaed from his former law firm.

Petitioner did not raise this issue pre-trial, during trial, or prior to sentencing.

It is undisputed that the undersigned's former law partner testified as only one of dozens of witnesses at trial, including a number of attorneys, and that his testimony described only certain real estate transactions. It is also undisputed that the alleged attorney-client privilege ruling concerning a document to which a hearsay objection was the principal objection made, an objections which was resolved in the Petitioner's favor. Petitioner's co-defendant, Bill Ray, was his usual North Carolina attorney.

As to the allegations concerning the law partner's representation in real estate matters of Chardon, N.V., Real Tech International Ltd., Colonial Manor Apartments, Darryl Myers, David Jack Vogt, Jr. (Petitioner), David Jack Vogt, Sr., and Harvey G. Mitchell, Jr., the undersigned can unequivocally state that he never heard the name of any of these individuals or entities allegedly represented by his former law partner prior to Petitioner's case with the possible exception of Harvey G. Mitchell, Jr., whose name was vaguely familiar to the undersigned as a local businessman or possible client of his former partner. To the best of his knowledge, the undersigned never met or saw Harvey G. Mitchell, Jr., at his law firm or elsewhere. The undersigned had no knowledge of any facts or circumstances concerning any of the individuals or entities or their business transactions, and was never advised prior to trial that *any* corporation or individual with which his former partner had contact would in any way be involved in the case.

The possibility of the undersigned's former law partner appearing as a witness in Petitioner's case was never raised

prior to trial. The attorney's name appeared as one of many on a lengthy list of possible Government witnesses, including several other attorneys, and the undersigned had no knowledge as to whether his former partner would likely testify, or the substance of his testimony. Had the matter been brought up at that time, it could have been fully explored.

The Petitioner was convicted only after a grueling three-month trial, in which every issue was vigorously contested by some of the more able criminal defense lawyers in the Southeast. It was obvious at the outset that it was not going to be the type of trial that many judges would relish, and after handling pre-trial motions at an earlier term the undersigned tried the case out of a sense of duty and responsibility to the court and his fellow judges. The undersigned is aware of the possibility that the Petitioner, an obviously intelligent and resourceful individual, may sincerely believe that he was convicted, as he alleges, as a result of bias and corruption, but is also aware that any period of incarceration, however fairly imposed, is onerous and something one might seek to avoid by whatever means necessary.

Because of the somewhat surprising but nevertheless serious allegations made by the Petitioner, the undersigned will recuse himself under 28 U.S.C. §455(a) to avoid even the appearance of impropriety in any further proceedings involving the Petitioner. While the undersigned is confident that he has handled all prior proceedings involving the Petitioner with fairness and integrity and could continue to do so, it is important that all reasonable steps be taken to assure the Petitioner that his motions will be determined promptly, fairly, and according to law.

THEREFORE, IT IS ORDERED that the Clerk of this Court refer all further motions, petitions, writs, and proceedings of any kind filed by the Petitioner or in his behalf to a judge other than the undersigned.

/s/ FRANK W. BULLOCK, JR.
United States District Judge

April 9, 1992

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

28 U.S.C. §455. Disqualification of Justice, Judge, or Magistrate.

(a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(2) Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

(3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;

(4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in this household has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could

be substantially affected by the outcome of the proceeding.

(5) He or his spouse, or a person within the third degree of relationship to either of them or the spouse of such a person:
(i) Is a party to the proceeding, or an officer, or trustee of a party.
(ii) Is acting as a lawyer in the proceeding;
(iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;
(iv) Is to the judge's knowledge likely to be a material witness in the proceeding;

(c) A judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interest of his spouse and minor children residing in his household.

(d) For the purpose of this section the following words or phrases shall have the meaning indicated:

(1) "Proceeding" includes pretrial, trial, appellate review, or other stages of litigation;
(2) the degree of relationship is calculated according to the civil law system;
(3) "fiduciary" includes such relationships as executor, administrator, trustee and guardian;
(4) "financial interest" means ownership of a legal or equitable interest, however small, or a relationship as director, advisor, or other active participation in the affairs of a party, except that:

(i) Ownership in a mutual or common investment funds that holds securities is not a "financial interest" in such securities unless the judge participates in the management of the fund;

(ii) An office in an educational, religious, charitable, fraternal, or civic organization is not a "financial interest" in securities held by the organization;

(iii) The proprietary interest of a policyholder in a mutual insurance company, of a depositor in a mutual savings association, or a similar propriety interest is a "financial interest" in the organization only if the outcome of the proceeding could substantially affect the value of the interest;

(iv) Ownership of government securities is a "financial interest" in the issuer only if the outcome of the proceeding could substantially affect the value of the securities.

(e) No justice, judge, or magistrate shall accept from the parties to the Proceeding a waiver of any ground for disqualification enumerated in subsection (b). Where the ground for disqualification arises only under subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification.

(f) Notwithstanding the preceding provisions of this section, if any justice, judge, magistrate or bankruptcy judge to whom a matter has been assigned would be disqualified, after substantial judicial time has been devoted to the matter, because of the appearance of

discovery, after the matter was assigned to him or her, that he or she individually or as a fiduciary, or his or her spouse or minor child residing in his or her household, has a financial interest in a party (other than an interest that could be substantially affected by the outcome), disqualification is not required if the justice, judge, magistrate, bankruptcy judge, spouse or minor child, as the case may be, divests himself or herself of the interest that provides the grounds of the disqualification.

FEDERAL RULES OF CIVIL PROCEDURE, RULE 60(B) - RELIEF FROM JUDGMENT OR ORDER:

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud; etc.

On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the

judgment, order, or proceeding was entered or taken. A motion under subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28 U.S.C. §1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audit querela, and bills of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.